No. 78-181

In the Supreme Court of the United States

OCTOBER TERM, 1978

DEWEY H. SIZEMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1978. The petition for a writ of certiorari was not filed until August 1, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1]

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[1] A "Motion for Leave to File Out of Time Petition for Writ of Certiorari," stating that petitioner's counsel erroneously believed the time limit to be governed by 28 U.S.C. 2101(c) rather than Rule 22, is appended to the petition.

QUESTIONS PRESENTED

1. Whether the government's failure to disclose payments made to a key witness denied petitioner a fair trial where the witness revealed these payments during her trial testimony.

2. Whether, in a prosecution for counterfeiting $20 bills, petitioner was properly cross-examined as to whether he had previously printed advertisements bearing a facsimile of a $20 bill.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on four counts of conspiracy and counterfeiting, in violation of 18 U.S.C. 371, 471, and 474, and received concurrent terms of five years' imprisonment for conspiracy and six years' imprisonment for the counterfeiting offenses. The court of appeals affirmed (Pet. App. A).[2]

The evidence at trial showed that Anita Goins, the girlfriend of co-conspirator Caesar Ybarra, informed the Cleveland (Tennessee) Police Department that petitioner, petitioner's wife, and Ybarra were counterfeiting money at petitioner's printing establishment (Tr. 12-13, 85-87). This information was relayed to the Secret Service, which thereafter maintained surveillance of the print shop for several days. On the evening of June 9, 1977, in the presence of petitioner and his wife, federal agents executed a search warrant covering the print shop (Tr. 88-89). They seized various items relating to the illegal counterfeiting

[2]Co-indictee Caesar Ybarra pleaded guilty before trial. Dorothy Mae Sizemore, petitioner's wife, was similarly convicted and was sentenced to probation for three years. She did not appeal her conviction.

scheme, including boxes of fully and partially printed counterfeit $20 Federal Reserve notes, a printing press, a printing plate, enlarged photographs of the face and back of a $20 bill, several negatives used in printing the bogus notes, an enlarger, and empty cans of green ink of the same type as was used to print the bills (Tr. 90-106, 111; Gov't Exhs. 1-18). The total face value of the fully printed bills was $5,220, and of the partially printed bills, $245,160 (Tr. 112).

Petitioner took the stand in his own defense and denied knowledge of or involvement in the counterfeiting activity (Tr. 256). He testified that he had discovered the printed bills stacked up upon returning to his printing shop following a coffee break on the evening of June 9 (Tr. 247-248).

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the government's failure to respond accurately to a pre-trial discovery motion by disclosing its payments to a prosecution witness mandates that petitioner receive a new trial. However, as the court of appeals concluded, the government's nondisclosure here was harmless beyond a reasonable doubt.

It is undisputed that the government erroneously represented that "there have been no agreements made between the government and any prosecution witness" in response to petitioner's specific pre-trial discovery request concerning such agreements. In reality, prosecution witness Anita Goins had received relocation money from the government when she moved from Cleveland, Tennessee to Huntsville, Alabama for protective purposes (Tr. 51-52, 77-79, 125-127).[3] Additionally, the government

[3]Caesar Ybarra, co-conspirator of petitioner's and Goins' boyfriend, had apparently threatened Goins.

gave this witness $1,500 upon her return to Cleveland (Tr. 52-57). Goins was not paid for her testimony at trial nor was she promised any additional funds or favors depending on the outcome of petitioner's trial (Tr. 53, 56-57).

Nevertheless, there is no merit to petitioner's claim of prejudice from the government's failure to disclose its financial arrangements with Goins. Defense counsel skillfully and repeatedly cross-examined both Goins and a government agent about the payments (Tr. 52-57, 73, 125-127, 147; see also Tr. 77-79) and thereafter used this testimony to base a strong attack on her credibility in their closing arguments (Tr. 303-304, 308, 315-316, 318; see also Tr. 296 and 324-325). The jury was thus fully apprised of this impeaching evidence, but nonetheless chose to convict petitioner upon overwhelming evidence of his complicity. In such circumstances, there is no "concern that the suppressed evidence might have affected the outcome of the trial." *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). Since petitioner had the full benefit of the evidence, he suffered no prejudice and his conviction was correctly affirmed. See *United States* v. *Acosta*, 526 F. 2d 670, 674-675 (5th Cir.), cert. denied, 426 U.S. 920 (1976); *United States* v. *Decker*, 543 F. 2d 1102, 1105 (5th Cir. 1976), cert. denied, 431 U.S. 906 (1977); *United States* v. *Stone*, 471 F. 2d 170, 173-174 (7th Cir. 1972), cert. denied, 411 U.S. 931 (1973).

2. Petitioner also claims (Pet. 11-14) that the district court erred in allowing the prosecution to cross-examine him about a prior similar act. Three years prior to the incident for which petitioner was convicted, the Secret Service reprimanded him for printing advertisements that included a facsimile of the back of a $20 bill. Additionally, the Secret Service compelled petitioner to

surrender the printing plate and negative used in this endeavor (Tr. 266-267). After carefully listening to counsel's arguments concerning this evidence, the district court ruled that it was admissible to prove petitioner's intent.[4]

Even if petitioner is arguably correct that the prior conduct was improperly admitted to prove intent, the district court did not err in allowing the prosecutor to cross-examine petitioner about this incident. The Federal Rules of Evidence render similar act testimony admissible for any relevant purpose other than "to prove the character of a person in order to show that he acted in conformity therewith." Fed. R. Evid. 404(b); see also *United States* v. *Benedetto*, 571 F. 2d 1246, 1248-1249 (2d Cir. 1978). Here, the challenged evidence was relevant to demonstrate petitioner's specialized knowledge about printing counterfeit currency and his ability to commit the crimes in question. See, *e.g.*, *United States* v. *Craft*, 407 F. 2d 1065 (6th Cir. 1969). Nor can it be fairly argued that the trial judge abused his broad discretion in admitting such probative similar act evidence. See *United States* v. *Williams*, 577 F. 2d 188, 193 (2d Cir. 1978), petition for cert. pending, No. 78-5029; *United States* v. *Fairchild*, 526 F. 2d 185, 189 (7th Cir. 1975) (Stevens, J.), cert. denied, 425 U.S. 942 (1976). Finally, in light of the overwhelming evidence against petitioner and the minimally prejudicial nature of the complained of cross-examination, any error involved was harmless beyond a reasonable doubt.[5]

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[4]At the same time that he ruled the printing incident admissible, the trial judge precluded the prosecutor from making any reference to petitioner's less relevant prior convictions.

[5]Petitioner further points out (Pet. 14) that the district judge did not give the jury limiting instructions concerning the evidence at the time of its admission. However, petitioner failed to request such a charge and cannot now be heard to complain. Cf. Fed. R. Crim. P. 30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978

DOJ-1978-09